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the facts were not in the knowledge of the party; it must also be shown that they were relevant, and that diligence was used to discover them. In Paterson's case the condescendence was thought not relevant. Surprise is not applicable to this case, as the regular notice was given of the witnesses. It was not to be expected on the present occasion, as the evidence has been under discussion in the other case since 1811.

The other Judges concurred in this opinion, and a condescendence was ordered on the second ground.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1818. March 16.

BERTRAMS *v.* BARRY and BRUCE.

Damages assessed for non-delivery of a quantity of wine.

THIS was an action of damages for breach of contract brought by Messrs Bertram for themselves, and as assignees of William Goddard and Company, and of James Stevenson.

DEFENCE.—The person who took the order had no authority to do so.

The pursuers, merchants in Leith, had among others given orders to the agent for the defenders for different quantities of Particular Teneriffe at L. 30 per pipe, and Cargo wine at L. 22 per pipe. The defenders having refused to deliver the wine to the pursuers at these prices, they raised the present action of damages, in which the Court of Session repelled the defence, and found damages due. The point sent to the Jury Court was to fix the amount of damages to which each pursuer was entitled, and for that purpose the following issues were sent.

ISSUES.

" 1. What damages have been incurred by " Messrs Bertrams, pursuers, in consequence " of the defenders having failed to deliver to " them, according to agreement, 20 pipes of " particular Teneriffe wine at L. 30 per pipe, " at twelve months credit?

" 2. What damages have been incurred by " William Goddard and Company, in conse- " quence of the defenders having failed to de- " liver to them, according to agreement, 15 " pipes of particular Teneriffe wine at L. 30 " per pipe, and 10 pipes of cargo wine at L. 22 " per pipe, both at six months credit?

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" 3. What damages have been incurred by " James Stevenson, in consequence of the de- " fenders having failed to deliver to him, ac- " cording to agreement, six pipes of particular " wine at L. 30 per pipe, and four pipes cargo " wine at L. 22 per pipe, both at six months " credit ?"

A number of witnesses were examined on both sides, and several of them had with them notes of purchases and sales made about the time the wine in question arrived ; which they were allowed to look at, as they stated them to be taken from their books made up at the time.

To entitle a party to parol proof of the rate of insurance, he must prove the policy lost or withheld.

The pursuers, when their parol evidence was closed, put in two of the policies to show the rate of insurance paid, and stated, that, as the third was mislaid, they had applied ten days before to the agent for the defenders to know if he would insist on their bringing the broker from Aberdeen to prove the rate of insurance. At that time it was understood to have been agreed to hold the correspondence as sufficient, but this admission was refused on Saturday before the clerk, and there was not then time to cite the witness.

LORD CHIEF COMMISSIONER.—You must prove the policy lost or withheld, to entitle us to admit this secondary evidence. What is stated may be true, but the question here is, if we can take the sum and terms of the policy from any thing but the policy? The policy being out of the way, all you can do is to state that you stood your own insurers, and under the general terms of the issue you may prove the rate of insurance at the time.

Jeffrey, for the defenders, stated,—In the Court of Session, we maintained that the agent had exceeded his commission; and though this, on a broad view of the case, was decided against us, it cannot be supposed that there was any intentional breach of bargain on the part of so respectable a house.

The market price is not to be ascertained by the number of sales, but the quantity sold. In this case, we shall prove the price at which the wine in question sold; and, if it was a fair marketable wine, they were bound to take it, and are not entitled to a higher price than it brought. We offered to settle with them on the principle that the wine would have sold for L.40, but they insisted on L.45. Our offer to the whole pursuers, on this principle, amounted

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to L.400. I hope you will not think them entitled to more than L.300; but, even if you should think them entitled to L.400, I hope you will not give them more, as, for a trifle, you will not be disposed to subject us in the expences.

Mr SOLICITOR-GENERAL, for the pursuers, contended,—A breach of bargain being ascertained, the pursuers are entitled not only to the average of the market, or to the price obtained for the wine in question, (which was of inferior quality,) but to the highest price they could prove to have been got for superior wine at or about the time when this wine arrived; and, to entitle them to this, it is not necessary to prove fraud.

[Mr Solicitor-General was about to read from the proceedings in the Court of Session, to prove at what place the price was payable, when he was interrupted by Mr Jeffrey, and the Court held he was not entitled to read them, as he had not given them in evidence.]

The first deduction from the price is the insurance. With respect to two of the quantities, the policies of insurance are produced; and, though the third was mislaid, there was also an insurance.

LORD CHIEF COMMISSIONER.—Mr Solicitor-General is scarcely entitled to state this without giving it in evidence. I should conceive that the way to state this is, to represent that they stood their own insurers, and that they are entitled to reasonable indemnification, as on that head.

Mr SOLICITOR-GENERAL.—The next deduction is the freight, and we admit this at the rate stated by the witness, but deny that we are liable for dead freight. The freighter may be liable for this, but cannot charge it on the wine.

The offer of compromise was refused, as the sum offered was too small; and it was not to terminate the litigation, the defenders having reserved their right of appeal from the judgment finding damages.

LORD CHIEF COMMISSIONER.—The question here is merely the amount of damages. If there had been any ambiguity in the issue, then we might have gone to the prior proceedings to explain it, but when the issue is clear, we must be ruled by it The issue shows us that the agreement was merely to deliver particular Teneriffe wine. It is not to be

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uncommon, nor is there any other superlative added to it. Any proof given that the wine was of inferior quality is too slight to proceed upon, and nothing can be given on this account; neither has there been proof of disappointment of any particular customer; and, therefore, you must estimate it by the very general loss of not getting the thing ordered.

The first claim is for the difference between L.45, the price at which Little's superior wine sold, and L.30, the price at which this was bought.

I agree so far with Mr Solicitor, that, if no proof had been brought as to the price at which the wine in question sold, then you might take the market price; but it is only in absence of proof of the article in question that you are to go to the general consideration. Little's superior wine sold at L.45, but it is not the fair estimate; and, therefore, the claim of the pursuers, in which L.45 is taken as the basis of the calculation, is not made out. Taking the highest price paid for parts of this cargo, and deducting from it the interest, it will come very near the sum offered by the defenders.

With regard to deductions, those having goods on board have nothing to do with the dead

freight. The only difference between Bertram and the others is, that he is not proved to have been insured; and, if they had all stood their own insurers, I do not think they would have been entitled to the deduction.

Another very important consideration, not only here, but in deciding the costs, is, whether the damages can be brought up to L.400, the sum offered by the defenders. That cannot be taken as a reason for assessing the particular damages; but, if you are of opinion that the damages proved do not amount to L. 400, I am persuaded you will not be disposed, in giving general damages, to raise the amount above that sum.

The damage is the difference between the price paid and the price at the time when it could be sold.

Verdict, "Find, upon the first issue, da-
"mages due to Messrs Bertram, L.160, 14s.
"as upon the 5th May 1812. Upon the se-
"cond issue, damages due to Messrs Goddard
"and Company, L.170, 15s. as on said 5th
"May 1812. Upon the third issue, damages
"to James Stevenson, L.68, 6s. as on the
"aforesaid 5th May 1812; and, on the whole,
"find damages due to the pursuers, L.399,

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"15s. with interest on said sum, from the "above date of 5th May 1812."

Wedderburn, Sol.-Gen. and *Jameson,* for the Pursuers.
G. J. Bell and *Jeffrey,* for the Defenders.

(Agents, *Cranstoun and Veitch,* w. s. and *T. Darling.*)

PRESENT,

THE THREE LORDS COMMISSIONERS.

LEVEN *v.* YOUNG and COMPANY.

1818. March 17.

L.2000 assessed as damages to a pursuer for the loss of his office, in consequence of the unfounded and groundless statements by the defenders.

THIS was an action of damages, for a groundless and malicious charge made against the pursuer, to the Treasury, and to his superiors in the Board of Excise, by means of which he was deprived of his office of Collector of Excise in the county of Fife; and also for circulating false and calumnious charges against him in public companies, and in the newspapers; and for having maliciously used inhibition in an ill-founded action brought against him.

DEFENCE.—Separate defences were given in for the different parties.

Messrs Young and Company, and Mr Pitcairn, denied having given the information, and